

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
3 BEFORE THE HONORABLE PEGGY A. LEEN, MAGISTRATE JUDGE

4 ORACLE USA, INC., a Colorado :  
5 corporation; ORACLE AMERICA, :  
6 INC., a Delaware corporation; :  
7 and ORACLE INTERNATIONAL : No. 2:10-cv-0106-LRH-PAL  
8 CORPORATION, a California :  
9 corporation, :  
10 Plaintiffs, :  
11 vs. :  
12 RIMINI STREET, INC., a Nevada :  
13 corporation; and SETH RAVIN, an :  
14 individual, :  
15 Defendants. :  
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17 TRANSCRIPT OF STATUS CONFERENCE

18 March 29, 2011

19 Las Vegas, Nevada

20 FTR No. 3B/20110329 @ 10:00 a.m.

21  
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1 LAS VEGAS, NEVADA, MARCH 29, 2011, 10:00 A.M.

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3 P R O C E E D I N G S

4

5 THE COURT: Good morning. Please be seated.

6 COURTROOM ADMINISTRATOR: Your Honor, we are now  
7 calling the status conference in the matter of Oracle, USA,  
8 Inc., et al, versus Rimini Street, Inc., et al. The case  
9 number is 2:10-cv-0106-LRH-PAL.

10 Beginning with plaintiff's counsel, counsel,  
11 please state your names for the recorded record.

12 MR. HOWARD: Good morning, Your Honor. Jeff  
13 Howard representing Plaintiff Oracle.

14 With me Kiernan Ringgenberg, Jim Maroulis, and  
15 Rick Pocker.

16 MR. ALLEN: Good morning, Your Honor. West  
17 Allen, from Lewis & Roca, appearing for the first time to  
18 make an appearance on behalf of defendants, Rimini Street,  
19 Inc., and Seth Ravin.

20 And also with me is counsel Rob Recker from  
21 Shook, Hardy.

22 THE COURT: This is the time set for a status  
23 conference in this matter. I have reviewed your joint case  
24 management report in this matter.

25 And let me hear first from the plaintiffs

1 concerning the status of the supplemental document  
2 production that you've been expecting from Rimini in this  
3 matter and where you are in that process.

4 MR. HOWARD: Thank you, Your Honor. As  
5 reflected in that statement, the parties, I think it's fair  
6 to say, have been working hard with the volume that they  
7 have to deal with and the technical material.

8 We have received about 1.5 million documents  
9 from -- pages from the plaintiffs so far. What we're  
10 waiting for is a list of things. Some of them are  
11 custodial documents. There's only been one custodian that  
12 has been fully produced on their side, two more which are  
13 almost complete.

14 And so we are expecting, just judging from the  
15 volume that has been produced for the one and the partial  
16 production so far -- and counsel can correct me if my math  
17 is wrong, but our estimation is they'll be somewhere in the  
18 order of 20 or 30 million documents produced once the  
19 custodial productions are complete.

20 I don't know when those will be complete. But  
21 both parties are producing additional custodians over the  
22 course of the next couple of weeks and month and then  
23 continuing thereafter. I can, if the Court is interested,  
24 tell you where we are in that process as well.

25 That's the custodial documents. In some ways

1 the more challenging part is the noncustodial documents.  
2 Those -- that's the actual copies of the software, copies  
3 of the downloads, copies of the installed environments that  
4 the defendants maintain on their systems.

5 With respect to those, the environments, we've  
6 received just about 10 -- less than 10 percent of those  
7 environments.

8 With respect to the records that reflect how the  
9 defendants go about generating their fixes that they  
10 deliver to customers, which is in some ways the most  
11 critical part of the evidentiary record, we haven't had any  
12 production of those. We've had access to that system  
13 through a VPN protocol, but we haven't had any actual  
14 production yet. And we will need it in order to prepare  
15 our evidence and for our experts to do their analysis.

16 With respect to the archives, the archives are  
17 the downloaded materials that the defendants have gone into  
18 Oracle's websites and downloaded. There's about 22  
19 terabytes worth of that material. It's a -- an almost  
20 mind-numbing amount of material. And by comparison we've  
21 said to the Court, 10 terabytes is the amount of materials  
22 in the Library of Congress.

23 That also has been done on an access basis  
24 through the VPN protocol. There hasn't been any of it  
25 actually produced yet. And let me pause and say that we're

1 not casting aspersions, and I hope it's clear. There were,  
2 I think, very good reasons why the parties agreed and why  
3 these issues have not been presented to Your Honor.

4 When dealing with this kind of material, it  
5 didn't seem reasonable for us to just say give us 22  
6 terabytes worth of material. They proposed a process, and  
7 we agreed to it, whereby we went in, we inspected it  
8 through a remote procedure so that we could be more  
9 surgical in the actual productions that we would do.  
10 That's taken some time.

11 I think in the end it will be more efficient.  
12 It would result in less material being produced. But this  
13 is where we are; for example, the archives not yet actually  
14 produced.

15 THE COURT: All right. And I want to stop you  
16 there.

17 MR. HOWARD: Yes.

18 THE COURT: Because it's obvious that you have a  
19 massive amount of material.

20 If you uncover every rock, if you look under  
21 everything, if you analyze everything, if you have experts  
22 pore over it, what you are describing is not doable within  
23 the time that the federal court's going to allow you to  
24 keep this case active before it's tried and resolved.

25 MR. HOWARD: And I hope it was clear, and we

1     tried to say in our statement, we're not going to attempt  
2     and we're not asking the Court to allow us to go in and  
3     uncover every rock.

4             Really what we're doing, and I hope it's  
5     reflected in our proposed additional depositions and in the  
6     way that we're going to go about the analysis, is we're  
7     looking for a fraction in each of these discrete categories  
8     of conduct. We have to multiply everything we do by four  
9     product lines because they did -- they had PeopleSoft, they  
10    had JDE, they had Siebel, they have the database.

11            So we're not asking to depose all of those  
12    people. We're not going to ask for all 22 terabytes  
13    ultimately to be produced. Or if we do, are able to work  
14    out a protocol, we're not going to be able to analyze that.  
15    Nobody could. It's humanly impossible to do. And you  
16    wouldn't let us anyway.

17            So our approach so far is that we need to have  
18    enough that we can reasonably analyze, and then what we  
19    expect we'll be doing is employing statistical analysis so  
20    that we can --

21            THE COURT: And have the parties discussed  
22    whether you can agree upon a protocol for a representative  
23    statistical analysis of the evidence on both sides so that  
24    you both have a common approach to presenting this to a  
25    jury, if it goes there, or closing discovery and having a



1 factual basis for presenting your dispositive motions on  
2 the key elements of your claims and defenses?

3 MR. HOWARD: We haven't discussed it in detail,  
4 Your Honor. They've seen what we've said and -- in the  
5 meet-and-confer that's led up to the filing of this  
6 conference. So they know that that's the approach we're  
7 thinking about.

8 It is -- just to give an example -- but I think  
9 it's -- let me just say, I think it's a good suggestion.  
10 It's one that the parties ought to sit down and explore.  
11 It may or may not shorten the time because there's an  
12 almost endless number of rabbit holes that you could go  
13 down in looking at what it is that I would evaluate.

14 THE COURT: All right. And Rule 26 tells me  
15 that I'm supposed to impose a proportionality review, what  
16 you can do, and what I should allow you to do.

17 And so I sincerely appreciate the spirit of  
18 cooperation and the collegiality that both sides have  
19 expressed in tackling what is admittedly a massive project  
20 here. But there has to be a reasonable way to get a handle  
21 on this.

22 And what is -- if you hit the litigation home  
23 run, what do you expect to recover in this case, based on  
24 now you've been at this since March of last year?

25 MR. HOWARD: Well, that's a very good question,

1 Your Honor. There are a couple of holes.

2 Damages are obviously something that we think  
3 that we would be entitled to. But probably as important,  
4 or more important than that, we want to stop having our  
5 intellectual property infringed. And it gets right to the  
6 question of whether you -- how you approach the analysis.

7 Because, for example, if there's a thousand  
8 fixes that they have sent out just for PeopleSoft and each  
9 of those fixes has up to 30 objects, that's the level of  
10 analysis that you approach.

11 If you, for example, were to say, well, let's do  
12 10 percent of the fixes and you weren't going to try to  
13 extrapolate that, then we might be able to prove, and I  
14 think we clearly would be able to prove, infringement for  
15 10 fixes.

16 But it would allow them to say, well, there's no  
17 proof as to the remainder, there's no proof as to what  
18 we've done with the remainder, and then we'd be in a very  
19 tough discussion about what the scope of the injunction  
20 would be.

21 And so it's very important to us to at least  
22 have an ability to extrapolate from a fraction of the  
23 evidence to put on proof, trial proof --

24 THE COURT: I understand that. And that's why  
25 I'm asking you if you've talked to the other side. Because

1 I hear from the other side all the time, you're one -- when  
2 you tell me that in your portion of the report, you're one  
3 of the biggest companies in the world. You want to do an  
4 amount of discovery and run this case -- run them into the  
5 ground in the process.

6 So it would seem to me that the defendants have  
7 every incentive to agree with you on a protocol that gives  
8 you sufficient representative sample in order to -- for you  
9 both to get and adjudication on the merits.

10 MR. HOWARD: And I think that that's -- and  
11 hopefully we can agree on that.

12 Even if we can't, the way -- and I will, if I  
13 may, Your Honor, draw on the experience that we've just had  
14 in a very, very similar case, the *Oracle/SAP* case, where it  
15 was the same software, it was the same -- very similar  
16 business processes that were being applied to the software  
17 because the defendant, Mr. Ravin, architected that same  
18 model there, that was two and a half years of fact  
19 discovery agreed by the parties and agreed by the Court,  
20 and we ended up adopting a statistical model there.

21 But in order to do that, we had to have -- the  
22 experts had to have -- the forensic experts and the  
23 statistical experts, had to have a population to sample  
24 from.

25 And so, for example, if you take the

1 environments and you're going to run an analysis to compare  
2 the files in the environments against the files in Oracle's  
3 registered works, or you're going to take the fixes that  
4 are delivered and compare the objects in those, which there  
5 may be 20 or 30,000 of them, and compare that against the  
6 files in Oracle's registered works, that is just a  
7 time-consuming process. There's no number of bodies you  
8 can throw at that. There's no amount of money you can  
9 throw at that. That's assembling your team. And we have a  
10 very large, very expensive legal team and expert team that  
11 are working hard at this.

12 But, you know, as evidenced by the example that  
13 it took four weeks just to run an index of one of these  
14 data stores just to do that baseline analysis for the  
15 population and then draw out your sample, your population  
16 sample to do that extrapolation, it just is a month-long  
17 process after you have the evidence. Even if it's agreed.

18 THE COURT: I started -- the question that  
19 started this back and forth here was how much is in dispute  
20 in terms of damages? And you didn't answer that question.  
21 You said what you're really looking for, if I heard you  
22 correctly, is injunctive relief that stops the infringing  
23 practices that you believe the defendants are engaged in.

24 MR. HOWARD: I'm sorry, Your Honor. I -- what I  
25 was trying to say is I thought I heard the Court say what

1 are you looking for? And what I was trying to say is that  
2 injunctive relief is just as important as damages. How  
3 much is the damages number? Our damages experts haven't  
4 been through that analysis yet to say that.

5 The damages number that was offered at trial in  
6 the trial last fall was \$1.6 billion for a similar -- a  
7 similar set -- a similar number of registered works,  
8 similar software, similar activities in scope that had been  
9 applied to that. The jury's verdict was 1.3 billion.

10 There are factors that are the same and there  
11 are factors that are different. So I can't say to the  
12 Court that it will be that number. But --

13 THE COURT: The reason I ask you is because some  
14 of your status report is directed towards -- you're talking  
15 about the fairness of being able to do an accurate damages  
16 calculation here.

17 And so the question I have for you, does it make  
18 sense to bifurcate liability and damages to save the time  
19 that it would take to do the damages analysis and focus and  
20 get you ready for the summary judgment and trial stage on  
21 the liability aspect of the case?

22 Because that seems to me that what you're  
23 telling me is the most expensive portion of the discovery  
24 that you need to do. But perhaps not.

25 MR. HOWARD: Well, I think -- it's an

1 interesting idea, Your Honor. And I think it's one that we  
2 would certainly entertain.

3 The damages -- I think what we were just --  
4 we've just been discussing in terms of the statistical  
5 analysis is likely necessary for the underlying liability  
6 in looking at the list of registered works.

7 And so it probably does make sense to have the  
8 ability to focus on that, for the parties to focus on that  
9 in staging the damages until after that's done. I think,  
10 you know, that that is a good suggestion.

11 The part that in particular we were focusing on  
12 with respect to damages in the statement itself also had to  
13 do with causation and with respect to the customers. And  
14 that was really reflected in the idea to have this bucket  
15 of hours that you would be able to choose some -- again, a  
16 small fraction of the customers that were out there because  
17 there are different damages models.

18 One of them is a lost profits model. The  
19 customers that they have recruited are going to be directly  
20 implicated in a lost profits analysis. We're going to say  
21 that we would have had that licensing maintenance revenue  
22 had they not gone to the defendants.

23 Defendants are going to say they would have  
24 gone -- left you anyway. And so being able to explore  
25 those issues --

1                   THE COURT:   Because they needed to fix your  
2 product, yeah.

3                   MR. HOWARD:   That's right.   That's exactly  
4 right, Your Honor.   And so -- and there's no way -- there's  
5 no better way to do that than to ask the customers.   But  
6 you can't -- you know, agree that nobody wants to go fly  
7 out and talk to 200 customers either.   And so, again, we're  
8 looking at a fraction of those.

9                   So that's -- it was really those causation  
10 issues with respect to lost profits that was driving that  
11 part of the proposal to expand the hours.

12                  THE COURT:   All right.   And I've interrupted you  
13 several times.   So if there's something that you wanted to  
14 add.

15                  I'm trying to figure out if there is a way that  
16 we can divide this case into more manageable chunks to  
17 determine, through the dispositive motion practice, such  
18 things as, for example, the argument that the defendants  
19 have that they have license agreements, that what they are  
20 doing is covered by the licensing agreements with the  
21 customers.

22                  Is that something that could be litigated and  
23 carve out a huge part of the case one way or the other?

24                  MR. HOWARD:   Maybe.   It may be.   There -- and  
25 it's something that we actually considered, Your Honor, as

1 whether it would be efficient and whether it would make  
2 sense to bring to the Court a limited motion that would  
3 address the licensing defense.

4           There are some hurdles to that. And it may be  
5 that the parties should be discussing whether we can  
6 overcome those hurdles because, you know, we were imagining  
7 things that they might say, such as there's variation in  
8 the license agreements and so -- whereas we can't expect  
9 the Court to review 200 license agreements, if we were able  
10 to present five or six that we thought were representative  
11 and focus on the key terms for a resolution of that, I  
12 think that would be efficient.

13           If the response is you can't do that, they're  
14 not representative, and so what you've decided as --

15           THE COURT: Well, that's why I started off by  
16 asking you folks if you've talked to one another. Because  
17 again obviously you want broad-reaching relief. However,  
18 they want to be able to exist after this litigation is over  
19 and not have spent every dime on litigating.

20           And so it seems that you both have a  
21 self-interest in mind in trying to get a judicial  
22 determination with a reasonable amount of discovery instead  
23 of the, as you call it, inconceivable almost amount of  
24 discovery that you could do if you had all the time in the  
25 world and no -- and no time or monetary limitations.



1 MR. HOWARD: And I -- and so we have tried to  
2 construct a proposal that acknowledges the reality that we  
3 can't do everything, that we can only do a fraction.

4 I think the idea of building -- of having the  
5 parties discuss and build in a possible targeted set of  
6 motion issues is a good one. The idea of --

7 THE COURT: For example, is there any chance  
8 that you might have a stipulated set of facts with respect  
9 to certain things? Can you stipulate that this is what  
10 they're doing, this is what the customers are receiving,  
11 this is what our software is, we think it's unlawful, they  
12 think it's authorized by the license agreement?

13 MR. HOWARD: I think my guess is --

14 THE COURT: Obviously I'm simplifying, but --

15 MR. HOWARD: Yeah, no, I think that's -- my  
16 guess is the answer's yes. I'm sure the parties can  
17 stipulate to facts.

18 However, the licensing defense is, you know, a  
19 big defense, and it would apply to, in particular, the  
20 existence of the environments, the many, many copies of the  
21 software that are on the systems, perhaps to the existence  
22 of the downloads on the systems.

23 What it doesn't as well address or what it's  
24 harder to resolve through a motion on it is the issue of  
25 cross-use. And it's really the issue of cross-use that we

1 think is the key issue in the case. Because we don't think  
2 there's any argument under any license agreement that  
3 they're allowed to take one customer's software and use it  
4 to develop fixes for another customer. And unfortunate --

5 THE COURT: You're saying what the problem is is  
6 exponential every time -- they're passing along by using  
7 iterations of the -- what they did the time before, which  
8 increases exponentially the number of potential  
9 infringements you have to look at.

10 MR. HOWARD: Well, that is true. But even if it  
11 wasn't true, they're nevertheless for each object, you  
12 know, these tens of thousands of objects that comprise  
13 these thousands of just PeopleSoft fixes that they've sent  
14 out, every time they create an object, our belief is, and  
15 so far it appears to be true, that they are taking that  
16 object from one customer's installed -- software that  
17 they've installed on their systems, and they're copying it  
18 and they're modifying it and sending that exact same file  
19 out to dozens and dozens of other customers.

20 And so that's what becomes exponential and  
21 difficult -- that's what requires -- as much as anything,  
22 requires a time --

23 THE COURT: I understand that. I understand  
24 it's a huge project. It's hard for extraordinary lawyers  
25 like yourselves to get around it.

1 But at the end of the day you're going to be  
2 asking the judge what's that order going to say? What's  
3 that judgment going to say that gives you the relief you  
4 think you're entitled to? Or the defendants have the same  
5 issue.

6 You are going to have to get a handle on it in a  
7 way that is presentable and that you get relief that means  
8 something.

9 MR. HOWARD: Yes. And that's -- and that's why  
10 I think that the statistical analysis, being able to  
11 address that fixed population -- and it's -- unfortunately,  
12 it's a human process. There isn't -- you have to talk to  
13 the people who are doing it to understand the data.

14 So we're going to -- it's a fraction of the  
15 people. It's a fraction of the fixes. That, I think, is,  
16 as much as anything, what drives the time. And to be able  
17 to say that it wasn't just March of 2009 with fix 11, but  
18 it was essentially all fixes over time, and you can't do it  
19 anymore.

20 THE COURT: Okay. And who will be addressing  
21 the defendants' position with -- obviously plaintiff had to  
22 go first, so I peppered them with some questions and  
23 suggestions about how to try to get a handle on this.

24 MR. ALLEN: I'll start, Your Honor.

25 THE COURT: Mr. Allen.

1                   MR. ALLEN: Sometimes fresh eyes on a big  
2 problem can be helpful. I hope I might have some  
3 insightful things to say.

4                   We're here on the fifth -- appears to be the  
5 fifth discovery hearing. And I wanted to address the Court  
6 because, as the Court's noted in articles, the pretrial  
7 tail is now about to wag the trial dog.

8                   And I say that in sincerity because this  
9 Court's -- obviously this Court's obligation is to make  
10 sure, especially in patent cases, that very large  
11 corporations don't multiply unnecessarily proceedings in a  
12 way that unfairly harms a smaller, in particular very small  
13 defendant.

14                  THE COURT: Sure. But they have to protect  
15 their intellectual property.

16                  MR. ALLEN: They absolutely do. And that's why  
17 for this case there's no secret, everybody knows really  
18 what the case is about. It's not like the SAP case, from  
19 what I can tell so far.

20                  This case is about a very successful large,  
21 multibillion dollar corporation that drafts very helpful  
22 software for the world. And they want to couple that with  
23 a very lucrative service industry that basically says,  
24 "Once you've bought our product, now you got to pay a lot  
25 of money to help us keep it updated and serviced," which is

1 entirely fine.

2 That creates a very large market for consumers  
3 that don't want to pay the expensive prices of the company  
4 that made the software, and within the scope of their  
5 proper license, they want to do what they're allowed to do  
6 within the scope of that proper license, to ask somebody  
7 else to come and help them, what they would basically do  
8 themselves if they could, but they can't, don't have time,  
9 don't know how to do it, so they ask a third party to come  
10 in and do basically what they would like to do.

11 THE COURT: Hence, the argument that what your  
12 client is doing is perfectly lawful.

13 MR. ALLEN: That's true. But that goes right to  
14 the issue of how you grapple all of discovery that  
15 plaintiff would like to do. The plaintiff --

16 THE COURT: And that's why I'm asking them, is  
17 some bifurcation -- does some bifurcation make sense? Can  
18 you limit -- can you agree upon a statement of facts? They  
19 want to know the universe of what it is you're doing before  
20 they bite into --

21 MR. ALLEN: Well, I think Your Honor made an  
22 excellent starting suggestion, which is let's look at this  
23 issue of licensing. Because the way I viewed it when I  
24 started looking at this case, just less than a day or two  
25 ago, is that the first question everyone ought to ask is,

1 are these consumers allowed to do within the scope of their  
2 license what they're asking Rimini to do?

3 And I just heard the issue of cross-using  
4 software that things are not supposed to do. From what  
5 I've seen Rimini, all they ever do, is exactly what the  
6 consumer could do.

7 And to the extent that Oracle's worried about  
8 cross-using of licenses, they are meticulous -- and this is  
9 why it's not like the SAP case, they are meticulous at  
10 making sure --

11 THE COURT: They think your client has erased  
12 data that makes it difficult to trace exactly what you've  
13 done, that you deleted data.

14 MR. ALLEN: From what I've seen so far, this  
15 client is very meticulous about making sure that they do  
16 exactly what that consumer has a license to do.

17 And to the extent they might create economies of  
18 scale by taking what consumer A can do and it's exactly  
19 what consumer B can do, they may create economies of scale  
20 of doing the exact same thing for consumer B within the  
21 parameters of the scope of the license that consumer B is  
22 allowed to do, which matches what consumer A did.

23 THE COURT: And what is --

24 MR. ALLEN: They may want to call that  
25 cross-using software improperly, but really it's not. It's

1 within the parameters of a license doing what that consumer  
2 is entitled to do.

3 And maybe the way for this case to get resolved  
4 is to just define -- Oracle could define and we could all  
5 agree what is appropriate.

6 I think the concern in this case is that  
7 Oracle's reporting to its shareholders, they want to do  
8 what they did with SAP, which is eliminate that whole side  
9 industry and keep that for themselves. Of course, they  
10 would want to do that. All of us would if that's what we  
11 could do.

12 But the real issue is what is proper --

13 THE COURT: If it belongs to them, they can; and  
14 if it doesn't, they can't.

15 MR. ALLEN: That's right.

16 THE COURT: I mean --

17 MR. ALLEN: And consumers, we believe, have a  
18 right to have a third party come in and, within the proper  
19 scope of their license, fix and make updates --

20 THE COURT: Right, so is --

21 MR. ALLEN: -- and do repairs and do those  
22 things.

23 THE COURT: -- the issue resolvable, as a matter  
24 of law, in a reasonable amount of discovery, Mr. Allen?  
25 That's what I asked the plaintiff, I hope in plain English.

1                   Without going through the massive project that  
2                   this is, will you agree -- can you agree with the  
3                   plaintiffs on what a representative sample of the discovery  
4                   is to present the issue to a judge to get a decision as a  
5                   matter of law and whether -- what it is that you are doing?

6                   First, can you agree on what you're doing; and,  
7                   two, can you agree on whether there's a small enough  
8                   universe of licenses that are involved; and, three, can you  
9                   frame the issue for dispositive motion practice?

10                  MR. ALLEN: I would say on behalf of the Rimini,  
11                  yes. In fact, that's one of the reasons we were here  
12                  today, to make sure that that's what happens as opposed to  
13                  what I perceive has happened is Oracle thought this might  
14                  just be SAP case 2. They came in and realized that it was  
15                  not. Because this company is very meticulous in making  
16                  sure that they do only what that licensee can do.

17                  And so what has happened, in my view so far, is  
18                  that Oracle now realizes: We don't have the massive what  
19                  they would deem as fraud or improper conduct; what we might  
20                  have, if we can get enough samples, is individual episodes  
21                  of maybe a little error here, a little error there, and we  
22                  can couple those all together and be able to show this  
23                  horrible story.

24                  But what the truth is is that we're here because  
25                  we want to do what Your Honor just said, have a



1 representative sample to show that this defendant is very  
2 good at making sure that they only do what the consumers  
3 are allowed to do themselves and that they don't do --

4 THE COURT: And how do you --

5 MR. ALLEN: -- what Oracle wants to show.

6 THE COURT: -- propose to get to the point --

7 MR. ALLEN: Well --

8 THE COURT: -- in which you give the plaintiff a  
9 comfort level that they have a genuine representative  
10 sample as opposed to the tip of the iceberg that they're  
11 not comfortable relying upon?

12 MR. ALLEN: I went through for the first time  
13 and went through the discovery that's been made so far.  
14 And I have to say, as Your Honor's noted, these parties are  
15 very professional, and they've done an exceedingly good job  
16 to accomplish and tackle a very large problem.

17 But as I put together the scope of the discovery  
18 that's been done already, it is a staggering number. They  
19 have and will have almost 2 million pages of actual Bates  
20 labelled documents. They have 1.5 million as of today,  
21 they'll have 2 million within the next few weeks.  
22 They've --

23 THE COURT: And you've only done one complete  
24 custodian's production?

25 MR. ALLEN: Is that correct?

1                   MR. RECKERS: Your Honor, let me address that  
2 real quickly.

3                   THE COURT: Yes, sir.

4                   MR. RECKERS: We did not proceed on a  
5 custodian-by-custodian basis. We estimate that we can  
6 finish the majority of our productions by the -- or at  
7 least for any priority custodians, by the end of --

8                   THE COURT: But there are only five priority  
9 custodians?

10                  MR. RECKERS: Right. So by the end of April  
11 we'll finish those --

12                  THE COURT: Right. How many total custodians  
13 were you asked for?

14                  MR. RECKERS: 54. And we'll finish those, we  
15 believe, almost everything by June with some -- perhaps  
16 some exception files into July, with the goal of the August  
17 1st discovery cutoff.

18                  THE COURT: So you propose to give them the  
19 materials that they've asked for by the -- before they can  
20 use them?

21                  MR. RECKERS: Well, I think what we're aiming  
22 for, the goal is to have all the custodians basically  
23 complete --

24                  THE COURT: I understand. But you're opposing  
25 any -- any adjustments to the discovery plan, but you're

1 acknowledging that you can't produce anything in time for  
2 them to use it until the discovery cutoff.

3 So, you know, that impresses me as not a fair  
4 position.

5 MR. RECKERS: I think -- and when it asked for a  
6 priority custodian, a custodian to be finished, we've been  
7 able to do so in two weeks. And we think we're able to do  
8 that. So two weeks before whatever date they've noticed  
9 for their deposition. And that's proven to be true for the  
10 first four or five depositions that have been noticed.

11 We think we can continue that pace. We think we  
12 can finish all of the 54 custodians substantially by a  
13 month before discovery ends, giving us another month window  
14 for any files that, for whatever reason, didn't process  
15 correctly, whatever needs special handling, then, of  
16 course, you know, other things that come up in the course  
17 of depositions as identified as production items to -- then  
18 we'll have that month window to finalize the production at  
19 the end.

20 And maybe it is the case that there will be  
21 things produced in that last month --

22 THE COURT: Because everybody's nightmare is to  
23 take a bunch of depositions and then have a subsequent  
24 document production and find out there's some game changer  
25 that needs to be reexamined with everything you've done

1 before. And that's not efficient, and that is what  
2 especially the defense side in your position usually tries  
3 to avoid.

4 MR. RECKERS: And, believe me, we are trying to  
5 avoid that. And I think that, you know, if it is the case  
6 that there is a late production, we're happy to work with  
7 plaintiff's counsel in remedying the issue.

8 And even if we stick to the schedule that we  
9 have, we are able to produce in that timeframe, it's  
10 possible, though, there could be depositions after the  
11 cutoff, a slight, you know, one- to two-month amount of  
12 wiggle --

13 THE COURT: You just don't want an open-ended  
14 procedure here?

15 MR. RECKERS: We just -- we want a targeted end  
16 date so this doesn't just go on and on. So it --

17 THE COURT: Right. But they're entitled to a  
18 fair amount of discovery to identify the problem and the  
19 merits of their claims.

20 And that's what I'm grappling with here, to  
21 accomplish your objective, which is not to run your company  
22 into the ground with so much discovery that it's cost  
23 prohibited but, on the other hand, giving the plaintiff a  
24 fair opportunity, in their due process rights, to explore  
25 their claims.

1                   MR. ALLEN: Completely agree. And I know the  
2 defendants have no intention of hiding back anything that  
3 would preclude the plaintiffs from showing their case.

4                   I simply note that in addition to the 2 million  
5 pages of documents, they have now 72 complete environments,  
6 which is a substantial, substantial number. In fact,  
7 that's over 3.8 terabytes of data which, in my mind, and  
8 maybe we're incorrect, and we could get corrected, but --

9                   THE COURT: Of a thousand --

10                  MR. ALLEN: -- that seems to be a --

11                  THE COURT: Of a thousand --

12                  MR. ALLEN: -- by far large enough sample to  
13 understand the scope of what they believe the problem is.  
14 Because with those environments or those silos, they can  
15 basically see exactly what Rimini did for those clients.  
16 And they can see --

17                  THE COURT: As long as you don't take a position  
18 that those aren't truly representative of the environments  
19 as a whole. And that's what their -- you know, that's what  
20 their problem is, that's fine if I limit discovery. And  
21 you say but it's so limited it doesn't mean anything.

22                  And that's why I'm kind of urging you folks to  
23 talk about your respective self-interests in limiting the  
24 discovery, giving them what they need in order to get full  
25 and effective relief if they win, and stopping the bleeding

1 if you do.

2 MR. ALLEN: I know the Court's noted, because  
3 it's in the documents, the size of the discovery that's  
4 been done to date. And I guess one of the issues that I  
5 would suggest to the Court and to all the parties is that  
6 with those kinds of -- as other counsel said, the  
7 conceivable discovery that we've already produced, yes, you  
8 could have their 11 experts go through and endlessly look  
9 through that.

10 It seems appropriate that with the type of  
11 discovery that's been done to date there's more than enough  
12 there to have those 11 experts go through that within the  
13 discovery plan that's been set forth by the Court to do  
14 it --

15 THE COURT: The question is will you agree to be  
16 bound by a finite sample? Will you agree to a common set  
17 of facts that makes the finite sample meaningful for an  
18 ultimate resolution of the case?

19 MR. ALLEN: Well, I certainly can confer with  
20 the client. But I presume they definitely would agree to a  
21 certain set of facts. They would say: This is what we do,  
22 and this is what we have done.

23 THE COURT: And giving them an opportunity to --

24 MR. ALLEN: Where the disputes will be, you  
25 know, was there a day that for one extra day the consumer

1     used his -- through our -- through Rimini, used his  
2     password to access the database of Oracle? Could that have  
3     happened? I don't know. It could have. Will Oracle jump  
4     all over that and line that up and say: Look at all these  
5     instances of abusing our website? I'm sure that's what  
6     they'll have to do.

7                 But the truth is if you stack up all the  
8     evidence that we have, and been produced, you get a picture  
9     that's quite different than the SAP case. You get a  
10    picture of a company that's legitimately doing the things  
11    that they're allowed to do under the scope of the license  
12    agreement and, in good faith, I believe, trying to do that  
13    without getting the ire of Oracle.

14                And if there's a way that the parties can sit  
15    down and do what Your Honor suggests, which is to say  
16    here's a representative sample, here's exactly what we do,  
17    let's have the dispute over whether or not we can do that,  
18    let's have -- and I think it's a great idea to have  
19    dispositive motions maybe on the issue of the scope of the  
20    license. Can we do this or can't we? We say that we can.  
21    We say consumers have a right to have this; and Oracle says  
22    no.

23                And that's a legitimate dispute for the parties  
24    to have before you start going into, you know, these  
25    unseemly numbers of 20 terabytes of data and where the

1 damage is.

2 The truth is this case is somewhat simple  
3 really. Can consumers allow a third party to come in and  
4 help them with their Oracle software? And what can be done  
5 to get that done? And what can you access?

6 Rimini's position is you can access everything  
7 that you're allowed to access under the scope of your  
8 license agreement. When your license agreement ends and  
9 your service agreement ends, that's it. You can't go past  
10 that --

11 THE COURT: Can you identify the universe of  
12 your license agreements that you are operating under that  
13 leads you to take that position?

14 MR. ALLEN: I presume there would be license  
15 agreement for every client, which I would think for --

16 THE COURT: Are they --

17 MR. RECKERS: It's Oracle's license agreement.  
18 So it would be the standard Oracle license agreement.  
19 Unless -- they may have different agreements for every  
20 customer. Maybe they do.

21 But that's the premise of what Rimini does, is  
22 look and understand the scope of the license agreement.  
23 That licensee has a right to make a copy, has a right to  
24 tinker and fix its software to the extent it can, I  
25 suppose.



1           And Rimini's niche, which is a very niche and  
2 demand, apparently, is to not have consumers have to be  
3 handcuffed to the company that made the software and to  
4 allow third parties to come in.

5           A typical example is, I learned today, the  
6 Detroit Public School System. They save a tenth of their  
7 budget because they can have third-party people come in and  
8 help tweak their HR system without having to pay an extreme  
9 high price of Oracle to do it.

10           And that's just an example of why I think the  
11 law will support this premise that licensees can do this as  
12 long as it's within the proper scope of the license. And  
13 that's really what this patent suit's going to be about.

14           So to answer Your Honor's question how do we  
15 grapple with this large discovery issue, I think the --

16           THE COURT: Well, I'm trying to explore whether  
17 the defendants are willing to -- you want a limitation on  
18 discovery, but with the limitation on discovery comes the  
19 fairness consideration for the plaintiff -- for both sides.

20           But if you can reach an accomodation and  
21 agreement on stipulated facts and stipulated terms of  
22 agreements upon which you base your respective positions to  
23 get it to a summary judgment motion, that can only be  
24 effective if your side of the table is willing to be bound  
25 by, systemwide, the result of that effort; in other words,

1 and not take the position that the representative sample  
2 that we agreed upon is not adequately represented or a  
3 resolution of this fraction doesn't resolve the whole of  
4 what it is that we are doing.

5 MR. ALLEN: Well, I think our client can agree  
6 in premise to that sample, although our client also wants  
7 to preserve and has the right to show that that is accurate  
8 and to show the types of --

9 THE COURT: I got that.

10 MR. ALLEN: -- things that show their defense.

11 THE COURT: But -- that's what I'm saying.  
12 That's why you -- you can't have it both ways.

13 You can't tell them to limit discovery to a  
14 small fraction of what it is that they have good cause to  
15 believe you're doing and then say that their discovery on  
16 that fraction that you convince the Court to limit you to  
17 isn't representative of what you're doing as a whole.

18 MR. ALLEN: I agree. And I would add to that, I  
19 don't believe -- because the scope is so significant, I  
20 think there's enough out there that the parties have plenty  
21 to show their case, both on the plaintiffs and perhaps on  
22 the defendants.

23 I think the issue for today is that we have a  
24 scheduling order in place, there really isn't, in fact, a  
25 motion in front of the Court to change the scheduling order

1 yet --

2 THE COURT: That's because I've allowed the  
3 parties to present motions through this mechanism instead  
4 of filing a formal motion.

5 MR. ALLEN: Yeah. And I think that's helpful.  
6 And I would suggest, respectfully, that we have these dates  
7 in place, let's work with the dates we have to get  
8 everything done and then to talk, as Your Honor suggested,  
9 to get it to.

10 I think it's literally the plaintiff's  
11 responsibility to do the discovery it needs to do for its  
12 case within the times the rules allow. And, sure, every  
13 plaintiff, especially every big one, would love to have  
14 that go on indefinitely because it's the purpose of a  
15 patent case sometimes to really put pressure on a smaller  
16 company.

17 And the Court's obligation obviously is to  
18 balance that, to make sure it's fair and appropriate. I  
19 think that the time that the Court's given, which is now  
20 that they filed over a year ago, there's a lot out there.  
21 And there's a lot --

22 THE COURT: No, except you haven't been able to  
23 produce on your end.

24 MR. ALLEN: Pardon me?

25 THE COURT: Except until very recently you

1 haven't been able to produce on your end.

2 MR. ALLEN: Well, I note that what's produced  
3 today is -- and within the next few weeks, will be 2  
4 million pages of documents and these environments and all  
5 the terabytes of the information that was used from the  
6 Oracle website.

7 THE COURT: I understand. But we started off  
8 with a plan that didn't contemplate that it would take you  
9 up to this point to get where you are here today.

10 So I believe in deadlines and I believe in  
11 schedules, and I push people to adhere to those. But I  
12 also believe to be as fair as possible to both sides and,  
13 within the limitations of my intellect, I try to do that.

14 MR. ALLEN: Well, as long as we are fairly  
15 keeping a watch on how much discovery is being demanded,  
16 and today it seems to me it's been fair, it's been  
17 remarkably overwhelming in its -- in the amount. The  
18 amount of data obviously we have already out there that has  
19 been produced is more than people can perhaps get their  
20 hands around.

21 But given that large amount that's out there, I  
22 am confident that both sides should be in the range where  
23 they can tell their story. I think defendants, of course,  
24 want to say let's not get out of hand, you have the picture  
25 of what's happened. In my view and the defendant's view,

1 the plaintiffs want to say, well, no, let's find  
2 everything. Because this isn't how the SAP case--

3 THE COURT: No, counsel for plaintiff just --  
4 that's the first place where I started with him. And he  
5 assured me that that is not the intention, that they want  
6 to understand the universe before they narrow it to get the  
7 issue towards resolution.

8 MR. ALLEN: Well, just to line these things up,  
9 I think, respectfully, they do really, truly have maybe  
10 that universe.

11 They've got 70 some of the environments,  
12 which -- which is a significant --

13 THE COURT: But they deposed a --

14 MR. ALLEN: -- number of all the environments.

15 THE COURT: -- a 30(b)(6) witness who said: I'm  
16 only familiar with a fraction of this, and you have to look  
17 at all the pieces together.

18 MR. ALLEN: Well, the environments in and of  
19 themselves reveal and tell a story. That's what their  
20 computer scientists and his 11 full-time helpers are doing.  
21 They're going through forensically and deciding here's what  
22 was downloaded, here's what was used when.

23 And I presume they intend to show here's why  
24 it's beyond the scope of what should have been allowed and  
25 what Rimini shouldn't have been able to do.

1                   And it would be wonderful for them if they could  
2                   take out of 20-some terabytes of data, you know, 300  
3                   episodes of going two days beyond the password lockout  
4                   date, or using something a little bit beyond what you  
5                   should have.

6                   And that's basically what this case, I assume,  
7                   will come down to now. Because you don't have what the SAP  
8                   case was, which was someone kind of grabbing lots of stuff  
9                   and perhaps using it in a way that was beyond the scope of  
10                  those licensees.

11                  Now you have a situation that you have a whole  
12                  new model that is trying to do, within the rules, exactly  
13                  what's allowed; and so Oracle now has to show all the many  
14                  episodes of copying something where you technically should  
15                  not have, or used a password when you really should not  
16                  have.

17                  And that's kind of what seems to be the reason  
18                  we have so much more discovery needed now, in addition to  
19                  what's been provided, because they want to be able to find  
20                  all those episodes, line them up, and tell their story with  
21                  that. And that's kind of where we are, from what I could  
22                  see.

23                  So, yes, our client is willing to produce  
24                  everything to make sure the plaintiff can tell their story,  
25                  but it's not willing to have discovery go on indefinitely.

1 And so far that doesn't seem to be a real demand or need to  
2 go even beyond the time we have set in the scheduling  
3 order. We still have the whole summer left.

4 And I know that plaintiffs probably want to do a  
5 lot more depositions than they ever said they needed to do  
6 early on, or maybe it's just a handful or more, but it's  
7 definitely -- it looks to me that we're about to have that  
8 situation where pretrial discovery is about to consume and  
9 overwhelm anything that could be had and hoped for at  
10 trial.

11 And I just make sure the Court's mindful of that  
12 calculation by large plaintiffs in patent cases to do that  
13 precise thing. And it seems like we're getting really  
14 close to that happening.

15 THE COURT: All right, Mr. Allen.

16 And I'll give counsel the last word to respond  
17 here because I think you've both got an inkling of how I'm  
18 pushing you to organize this.

19 MR. HOWARD: Well, I think it's helpful, Your  
20 Honor. Very briefly.

21 I understand that my colleague may be newer to  
22 the case, and so there's a couple of factual clarifications  
23 I want to make.

24 And I want to be very clear. We do not, as I  
25 stand here, have the tools, or even close to it, to do the

1 analysis that we need to do, even for a sample.

2 We need to have the population, we need to have  
3 the things that the 30(b)(6) witness identified, we need to  
4 have the custodian documents, we need to depose some number  
5 of the developers.

6 We gave Your Honor an Exhibit B, which was a  
7 document that I used -- I deposed the 30(b)(6) witness a  
8 couple of weeks ago, when she told me that you need to go  
9 work out all these other things.

10 And if you look through it, in her testimony, is  
11 not what counsel just said. It's not meticulous. It's not  
12 by customer. It's not according to the license.

13 But in order to figure that out -- and if I  
14 could just for one second use Exhibit B as the example, in  
15 a note on page 2 of Exhibit B, it says: Birdville ISD  
16 confirmed they do not need this update.

17 Well, you have to go to three other documents  
18 and go through the notes to understand that Birdville  
19 software was the software that was used to create the  
20 update. If that note wasn't in Exhibit B, you wouldn't  
21 know on the face of it that one customer's software has  
22 been used to create a fix to send to another customer.

23 So that was an example. But that's the work  
24 that you have to do with enough developers, with enough  
25 fixes in order to do an extrapolation with documents we



1 don't have, data we don't have, environments we don't have,  
2 just to run them through.

3 And the declaration we provided to the Court,  
4 Mr. Hicks' declaration, is un rebutted. And we asked him:  
5 How long will it take you, once you get this stuff, to do  
6 the statistical analysis?

7 And his answer was eight months for that.

8 The licenses are not the same. They're legacy  
9 companies; PeopleSoft, J.D. Edwards, Siebel. So they vary.  
10 But the one thing they are consistent about is you cannot  
11 use the software to support another customer.

12 So whatever other arguments there may be about  
13 everything else, I think that fix analysis, which  
14 unfortunately is the most time-consuming, is where we're  
15 going to be focusing.

16 THE COURT: All right. Counsel, I'm going to  
17 set this matter for a status check after April 29th, which  
18 is the deadline that the defendants have committed to  
19 make -- to produce a significant amount of additional  
20 discovery.

21 I'm going to give the plaintiff some adjustment  
22 to the discovery plan and scheduling order deadlines in the  
23 matter. And I'm going to require the parties to meet and  
24 confer to determine whether you can come to an agreement of  
25 some type of reasonable bifurcation that will limit the

1 scope of discovery to get to a resolution on a stipulated  
2 set of facts or elsewhere on portions of the case to make  
3 it more manageable and time and cost efficient for both  
4 sides.

5 And there are a lot of arrows in my quiver, but  
6 this case is not going to take two and a half years to  
7 finish for discovery. And what your expert might want to  
8 do is the ideal case and what your expert is going to be  
9 stuck with is another thing.

10 And the defense, again I've tried to be as  
11 explicit as I can, if you want a limitation, you're going  
12 to live with that limitation. It's going to have a binding  
13 effect on you. And so it would seem to me that you have  
14 mutual interests in seeing if you can agree on common  
15 protocols to get the case to resolution with a reasonable  
16 amount of discovery and analysis on a stipulated set of  
17 facts or a representative sample of data and accounts that  
18 you're concerned about.

19 Perhaps you can and perhaps you cannot. But I'm  
20 not going to give open-ended discovery. The plaintiff has  
21 made a convincing case that more is needed. But I'm also  
22 not going to allow you to do an infinite amount of analysis  
23 and calculation on terabytes of documents for an  
24 undefinable period of time.

25 So I hope that gives you some guidance. I am

1 going to give them some adjustments. And that's, in large  
2 part, because you're producing on a rolling basis and have  
3 not been able to keep up the schedule on your end.

4 And so I am not going to unreasonably compress  
5 the time the plaintiff has to review and analyze data  
6 because of your client's inability to produce more faster.

7 Because I could say -- if they already had the  
8 universe, I could say throw as many people as you need to  
9 throw at it, to do it. It's been done to me when I was on  
10 your side of the table.

11 So been there and done that, folks.

12 Let me give you a date in approximately mid-May  
13 and see where we are, see if you have a proposal for  
14 managing this case in chunks that make it less expensive  
15 for everybody and more likely to get you, if not full  
16 relief, at least perhaps incremental relief.

17 Mr. Miller, do we have a date for a status  
18 check?

19 COURTROOM ADMINISTRATOR: Yes, Your Honor. This  
20 matter will be set for status check on Tuesday, May 17th,  
21 2011, at 9:00 a.m.

22 THE COURT: Okay. And I strongly urge you to  
23 confer in person. I know e-mail is *de rigueur*, but it's  
24 really difficult to come to a meeting of the minds and  
25 communicate on concepts of any depth. At least it is for

1 me.

2 So we'll see you back, see if we have some  
3 substantial progress and if we have a proposal for trimming  
4 this down into more manageable parts.

5 And if not, that's what I get paid the big bucks  
6 to decide.

7 All right. Thank you for appearing here,  
8 counsel. Good day.

9 COURTROOM ADMINISTRATOR: All rise.

10 (The proceedings concluded at 10:49 a.m.)

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I certify that the foregoing is a correct  
transcript from the electronic sound recording  
of the proceedings in the above-entitled matter.



11/22/16

Donna Davidson

Date